No. 87-703

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The Government's brief is repeatedly and demonstrably not faithful to the record. The issues were properly presented and preserved below and in this Court. They are important to the administration of federal criminal justice.

I. GOVERNMENTAL SEIZURE AND RETENTION OF AN INDICTED PERSON'S PROPERTY.

A. "Inherent Authority."

1. The Government's brief says nothing at all that might explain where it supposedly gets the "inherent" power it asserted and applied here, R. 107, to seize and hold property that is concededly not related to any crime, simply because the owner was indicted.

2. The Government tries to invent a different record when it asserts (with no citation) that petitioner's assets were "deposited in the registry of the court in connection with the civil case." G. Br. 5. The record is utterly clear that the trial Judge (who had no jurisdiction of the civil case, which was before a different judge) accepted the Government's application that this defendant should not

be allowed to use his own money to pay his own lawyer, and that instead his savings would be "preserved," R. 107, to pay his future sentence—a ruling impossible to square with *Powell* v. *Alabama*, 287 U.S. 45 (1932), not to mention the presumption of innocence. The property was taken by the Government. R. 83-87, 107. On the Government's motion the Judge signed an order in this case sequestering petitioner's property *three weeks before the civil case was even filed*, R. 25-26, and did not amend it until his post-trial order directing the assets be liquidated "[i]n accordance with the sentence of this Court." Pet. Cert. 33a.[1] It is simply undeniable that the assets were seized in the extradition, held by the Government, ordered sequestered by the Judge in this case, ordered sold to carry out the sentence, and remain under his order. R. 63-69, 74, 83-87, 277pp-rr, 277ww, 283, 286, 791-92, 1004-07.[2]

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[1] A magistrate later signed an *ex parte* order in response to the civil plaintiff's request for attachment under California law "in the event the district court orders the stock certificates returned to Van Cauwenberghe." J.A., No. 87-336, at 27. The judge in this case a week later commented, referring to what he described as petitioner's property "that the Government tied up," that "it still sits in the registry of the court subject to my order. If you don't believe it, draw up an order and I will tell the magistrate." R. 11/18/85 23. After the sentencing the assets left California in January 1986 pursuant to the criminal judge's order for title transfer and efforts at liquidation, and have not returned. A month later the civil plaintiff obtained another *ex parte* order under California law purporting prospectively to attach any assets of petitioner "which will be" in California, J.A., No. 87-336, at 76; California law does not authorize attachment of property outside the state. No valid attachment ever was perfected.

[2] The Government's assertion that "Petitioner agreed that the outcome of the attachment proceeding was relevant to the Court's decision on the Rule 41(e) motion" G. Br. 5, or "disavowed" his endless effort to have his property returned, G. Br. 8, again, is clearly contradicted by the record. Petitioner in fact objected strenuously and repeatedly to any consideration of the civil proceeding, R. 11/12/85 18, 23, 24, 26, and the judge himself said, "That [the civil case] will not in any way effect [sic] the handling of this case." *Id.* 36. The context in which petitioner's counsel at one argument

3. The Government sweepingly argues:

> "petitioner is not entitled to have the stock certificates returned to him, whether or not he was aggrieved by an unconstitutional search and seizure or other constitutional deprivation." G. Br. 11.

But "[j]urisdiction to return is not dependent upon whether the matter falls within the compass of Fed. R. Crim.P. 41(e)." *United States* v. *Hubbard*, 650 F.2d 293, 303 n.27 (D.C. Cir 1980) Even the Sixth Circuit case on which the Government relies rcognizes all that is required for return under Rule 41(e) is "a property interest" *Sovereign News Co.* v. *United States*, 690 F.2d 569, 577 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). The Government's position in this case would simply nullify the protections of the Constitution as well as the Federal Rules.[3]

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said that he was not simply asking for return, *id.* at 24, was as explanation that he did not expect the court to hand the assets back without allowing the Government an opportunity to prove that they were evidence or fruit of a crime, *id.* at 23; in fact, he repeatedly challenged the Government to attempt to do so, challenges which the Government declined, see *id.* at 18, 19, 21, 22, 29, 30, 34, 41. Petitioner again after the trial, R. 1004-1008, and at every stage of the appeal continued to press for return of his property.

[3] The Government's other new assertion in this Court that petitioner somehow "voluntarily," G. Br. 7, would give up all claim to property worth more than $1 million is on its face ridiculous. The record leaves no doubt that (1) the District Court ruled that petitioner must remain exiled in the United States until the nearly $500,000 restitution was paid, Pet. Cert. 36a; (2) petitioner asked for return of his assets so he could use part of them to pay the restitution, *id.*, 29a; (3) the District Court refused unless he transferred title in part to the government attorney, *id.*, 31a-32a; (4) petitioner, having no other way to pay the restitution and go home, complied. *Id.* 33a. After the petition for certiorari was filed herein, the Government stated that it now would allow petitioner to go home if he would instruct his attorney to transfer title to the assets to the clerk of the district court for disposition pursuant to any ruling of this Court, in exchange for giving up all claims for relief outside the United States. Because of the express *quid pro quo* nature, and because all his claims are expressly preserved, the legality of the exile condition remains at issue.

B. The Sixth Amendment Violation.

1. The Government misconceives the nature of petitioner's Sixth Amendment claim. Petitioner never contended that he was denied effective counsel, although his defense in other aspects was hampered.[4] The Sixth Amendment violation was the seizure of property that prevented paying counsel of choice—the very oldest and most central part of the right of counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932).[6] The District Court said, "he can change counsel if he can't afford you," R. 2771, and "if he hasn't any money, then we can appoint a public defender," *ibid.* Present counsel felt a professional obligation to continue to represent him nevertheless, serving unpaid in a four-week trial in a distant city, with substantial post-trial demands as well.[5] Not every counsel could do so. *Cf. Amicus* Brief of N.A.C.D.L., at 5, 24, 29-30. That does not preclude judicial review *United States* v. *Harvey*, 814 F.2d 905, 929 n.11 (4th Cir. 1987). Moreover, the District Court still holds the property and counsel are still unpaid.

2. As for the Government's inexplicable argument that the Sixth Amendment claim was not adequately raised below, the record shows that it was raised in both courts,

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[4] Petitioner informed the court that he needed the funds because "it is now very apparent to us that the defense witnesses will all or almost all be coming from Europe," and "there are other expenses." R. 277a, 277e. "Each witness, who has got to be brought over to this country is going to cost several thousand dollars." R. 277yy. The court said, "If you want them as your witnesses and want to pay their expenses over, you can have them." R. 9/30/85 14.

[5] The District Court's comment was, "They have a big firm. They run up nice, little computer runouts for all the time spent, so we will not worry about them." R. 9/30/85 66-67.

[6] Even the cases the Government cites emphasize the serious Sixth Amendment interest against seizing a defendant's assets in any circumstances, referring to such actions as "egregious" and "extreme sanctions." *United States* v. *Lewis*, 759 F.2d 1316, 1324 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

not once but repeatedly, and was the focus of oral arguments as well. Moving for return of his property, petitioner in his papers even quoted the very text of the Sixth Amendment; he said that continued withholding of his assets "would violate his right to 'the Assistance of Counsel for his defence' under the Sixth Amendment," R. 68, and that the Government's action was "depriving Mr. Van Cauwenberghe of funds to pay for his defense." R. 69. In his reply memorandum, he reiterated that "He needs the funds . . . in order to defend himself in this trial." *Id.* at 2. In open court, his counsel stated that "Mr. Van Cauwenberghe needs this money to defend himself," R. 277uu, that "Mr. Van Cauwenberghe needs this money for his defense," R. 277yy, that "he needs it now," *ibid.* and that the Government was "depriving Mr. Van Cauwenberghe of the assets to defend himself." R. 10/28/85 83. The trial court replied that "You want to get ahold of the stock so he has got something to pay attorneys fees with. I know what it is all about." R. 288. On appeal petitioner argued that the seizure "violates the Sixth Amendment" and cited two cases so holding. Br. App. 27-28. The Government's summary of petitioner's position to the Court of Appeals was as follows: "Van Cauwenberghe protests that the retention of these assets violated his fourth, fifth and sixth amendment rights." G. Opp. Reh. 3-4. On rehearing, petitioner called the Court of Appeals' attention to the Fourth Circuit's intervening decision in *United States* v. *Harvey*, *supra*, which came down after the oral argument in his case (he had cited the lower-court decision in his opening brief), and he again urged that "taking property so as to impair ability to retain and pay counsel is itself a Sixth Amendment violation." Pet. Reh. 5. On this record, it is no service to this Court for the Solicitor General of the United States to represent that the Sixth Amendment claim "amounts to a new issue that petitioner has failed to litigate below." G. Br. 9.

II. JUDICIAL ABSTENTION FROM INTERPRETATION OF U.S. TREATIES.

1. In the Court of Appeals, as that court explained, "the government insists that Van Cauwenberghe's argument is foreclosed by the Swiss Federal Tribunal's decision because 'determination of whether a crime is within the provisions of an extradition treaty is within the sole purview of the requested state'" quoting the Government's brief. Pet. Cert. 12a-13a. The Court of Appeals flatly held: "We agree." Pet. Cert. 13a. Reluctant now to have to defend in this Court the extreme ruling of the Court of Appeals, the Government now says that the court simply paid mild "deference" to a Swiss ruling.[7] G. Br. 12. But the holding, which the Government eagerly sought below, speaks for itself. The Ninth Circuit holds that foreign courts conclusively determine the meaning of U.S. treaties. It is a major turnabout in U.S. extradition law.

When a defendant enters this country by extradition, he "came to this country clothed with the protection which . . . the true construction of the treaty gave him." *Ker* v. *Illinois*, 119 U.S. 436, 443 (1886); *accord*, *Johnson* v. *Browne*, 205 U.S. 309, 317 (1907). A treaty is "equivalent to" a statute, interpreted "applying, as we must, our own law." *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 10, 18 (1936). Heretofore it has been a "rule of domestic law that the courts of this country will not try a defendant extradited from another coun-

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[7] The Government has submitted to this Court a flagrant mistranslation of a Swiss opinion. The opinion is not in the record because the Government heretofore denied its existence, in the face of petitioner's requests for a copy. See R. 43, 244, 246-47, 254, 262-66, 300-11, 334-36. Petitioner has obtained the French original. The Swiss court did *not* say, as the Government's "official" version claims, that the charges here "constitute a fraudulent scheme," G. Br. 3; it stated, on the contrary, based on what the Government told it, that the charges "constitute a defrauding" (*escroquerie*), *i.e.*, a consummated fraud—exactly the error as to U.S. law that petitioner has all along complained the Government intentionally induced. See pp. 3a-4a, *infra*; Pet. Cert. 23 & n.14.

try on the basis of a treaty obligation for a crime not listed in the treaty." *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973). The Government does not even cite three other cases so holding, see Pet. Cert. 22-23, apparently pretening that they do not exist. It also fails to discuss the Eighth Circuit holding that specifically rejected the very Government argument that the Ninth Circuit—acknowledging uncertainty, Pet. Cert. 13a—embraced here. *United States* v. *Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987).[8]

2. The Government's misdescription of an English decision, *United States Government* v. *McCaffery*, [1984] 2 A11 E.R. 570 [1984], 1 Weekly L.R. 867 (H.L.), is unconscionable. The Government concedes, G. Br. 14 n.5, that the Attorney General and Secretary of State in 1933 acknowledged that the 1900 extradition treaty with Switzerland does not cover the offenses for which the Government sought his extradition. The Government says (as if it would matter) that "that view is no longer the official position of the government of . . . the United States," G. Br. 14 n.5, and cites as authority the English grant of extradition for these offenses in the *McCaffery* case. What the Government's brief does not disclose to this Court is that the *McCaffery* ruling was under a *1972* treaty which contained a protocol that *explicitly added* these offenses. See [1984] 2 A11 E.R. at 574; 28 U.S.T. 236 (1976). By coincidence, the record of this case contains a declaration submitted by the Department of Justice with respect to another defendant, p. 1a, *infra*, that *acknowledges* that without such an amendment, there is an "obvious failure" of such a treaty to cover these offenses.

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[8] The long string of cases cited at G. Br. 11-12 have to do with the different issue of whether an offense is a crime in both countries, not whether U.S. law recognizes an offense as covered by the treaty. Some of them deal with both issues, and when they do, they of course consider and decide the question of treaty coverage as a matter of U.S. law. See, *e.g.*, *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

III. "RESTITUTION" TO A NON-VICTIM.

The Government asserts that Roger Vanden Stock, to whom the court ordered petitioner to pay over $458,000, was "a defrauded victim who was named in the indictment, specified in the jury instructions, and whose loss from petitioner's fraud was clearly demonstrated at trial." G. Br. i. The record and undisputed testimony of Vanden Stock himself and other Government witnesses was: (1) He was not named in the indictment, R. 1-6;[9] (2) He was never mentioned in the jury instructions except once in passing as a "witness," R. 12/13/85 3470; (3) He himself testified at trial that he suffered no loss at all, R. 607, 687, 696, 781-82, 970-71. Whether it is permissible under 18 U.S.C. § 3651 to award "restitution" to a non-victim except as a plea bargain is a question never resolved by this Court. Six Circuits have held that it is not; the Ninth Circuit here allowed it.[10]

IV. PROBATION WITH "NO PROBATIONARY PURPOSE" AND CONTRARY TO LAW.

1. The District Court's requirement that petitioner "shall not leave the United States until restitution is paid," Pet. Cert. 36a, stands in counterpoint to the same district court's finding that

> "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States," Pet. Cert. 38a,

and that he "has relinquished control of sufficient assets to pay the full restitution ordered in this case in due

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[9] The Government elsewhere states correctly, as did the Ninth Circuit, Pet. Cert. 7a, that the charge was that petitioner "participated with two American citizens in a scheme to defraud a Belgian stockbroker and a Belgian corporation." G. Br. 2.

[10] The Third Circuit in *United States* v. *Sleight*, 808 F.2d 1012, 1019 (3d Cir. 1987), relied on at G. Br. 15, said it was adopting a "broader conception . . . than has been accepted in other circuits." The other two cases the Government cites, also from the Third and Ninth Circuits, were plea bargains. *United States* v. *Woods*, 775 F.2d 82 (3d Cir. 1985); *United States* v. *Whitney*, 785 F.2d 824 (9th Cir. 1986).

course." Pet. Cert. 37a. The very cases the Government cites make clear that a probation with no probationary purpose is—not surprisingly—invalid. See, *e.g.*, *Higdon* v. *United States*, 627 F.2d 893 (9th Cir. 1980).

2. The Government's proposal that petitioner after two remands and three unsuccessful efforts in the District Court already, see, *e.g.*, pp. 5a-6a, *infra*, should keep trying for relief from the Ninth Circuit, forgets that his claim all along was that the exile condition was unlawful on its face under federal statutes and the Constitution; in remanding, the Ninth Circuit denied the relief he sought and erroneously treated it as a matter of trial court discretion.

3. The Government asserts that "Petitioner advises that the district court on remand has made a new finding" that the assets may not be sufficient to pay the restitution order, and cites "See Pet. 9." We defy anyone to read the cited page (or any other) and discover any such thing. No such "new finding" exists. The District Court's findings never changed (in fact with the dollar's drop the property's value has increased). The Government knows this very well. Yet its brief offers such misinformation to this Court, while obliquely disowning responsibility for doing so.[11]

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[11] The Government's statement of facts (which relies mainly on citations to the Government's own brief in the court below) is also full of plain misstatements of the record. For instance, it asserts that Roger Biard lent $1 million to petitioner, G. Br. 2; the record shows without dispute that the loan was to a partnership wholly controlled by Alan Blair, R. 367, 385, 387, 389 and G. Ex. 3, and that the District Court found, "I have held that any representation made to Mr. Van Cauwenberghe is not to the partners because he wasn't a partner." R. 871. The brief asserts that "the Vanden Stock family" owned a corporation that bought an interest in property from the partnership, G. Br. 2; the record shows by the undisputed testimony of government witnesses that the corporation was owned by another corporation that was wholly owned by Constant Vanden Stock alone. R. 556-57, 584, 779-81, 825, 970. The brief states that petitioner made two payments on the Biard loan, G. Br. 2; the record shows without dispute that Blair's wife made

V. RELATION TO NO. 87-336.

This Court has already granted certiorari in the civil companion case, *Van Cauwenberghe* v. *Biard*, No. 87-336. The Government repeatedly cites that case as relevant here. See G. Br. 10, pp. 1-2, *supra*. It is, although for different reasons. It and this case each calls for examination of the proper application of *United States* v. *Rauscher*, 119 U.S. 407 (1886), and the treaty with Switzerland—there in the civil context and here in the criminal. That complementary legal inquiry, plus the judicial economy from a single set of underlying facts, make it all the more appropriate to grant certiorari and set the two cases for argument in tandem.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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January 7, 1988

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them, R. 363, and the Government's own witnesses testified that "Wilfried Van Cauwenberghe never had anything to do with" the payments. R. 814; see also R. 816-17, 910-12.

APPENDICES

APPENDIX A

(Record 144-45)

DECLARATION OF MURRAY R. STEIN

I, Murray R. Stein, do hereby declare that:

(1) I am the Associate Director of the Office of International Affairs, Criminal Division, U.S. Department of Justice. I have been so assigned since the office was created in 1979. Prior thereto I handled international criminal matters for the Department while assigned to other offices within the Criminal Division. For almost twenty (20) years, I have been involved in extradition matters for the United States Government.

(2) During this period, I have contributed on behalf of the Department of Justice in the drafting as well as in negotiations for a number of extradition treaties. I participated, as then permitted by the Department of State, in preparations for the United States-United Kingdom Treaty of Extradition 28 U.S. 227 (1977). I also reviewed the treaty on the behalf of the Department of Justice in order to advise the Department of State whether we could support ratification of the treaty.

(3) I recommended, and the Department of Justice agreed, that it could not support the extradition treaty with the United Kingdom as signed. Among the difficulties that we advised the Department of State was the obvious failure of the treaty's provisions to provide for the extradition of numerable federal offenses including those involving mail and wire fraud and the Travel Act (18 U.S.C. §§ 1341, 1343 and 2314 respectively).

(4) The failure by the Department of Justice to support the treaty caused the Department of State not to forward the treaty to the Senate for ratification and to reopen negotiations with the British.

(5) Although the Department of Justice also did not participate in the reopened negotiations, its proposal became the protocol to the treaty. It was understood by the Department of Justice, and accepted as correct by the Department of State negotiator, that the language in the protocol would eliminate all concerns of the Department of Justice that federal offenses such as 18 U.S.C. §§ 1341, 1343, and 2314 would not be extraditable. It was the understanding of the Department of Justice that the so-called "transportation" clause would be viewed by the British as eliminating an impediment to surrender for extradition of offenses for which the United States had been unsuccessful under the provisions of the existing treaty—e.g. mail and wire fraud, and Travel Act.

(6) Upon acceptance by the British of the protocol and its incorporaiton into the signed treaty, the Department of Justice advised the Department of State that it would support ratification of the treaty. The amended treaty was thereafter forwarded to the Senate for its approval and subsequently the President announced that it had entered into force.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18th, 1985.

/s/ Murray R. Stein
MURRAY R. STEIN
Department of Justice

APPENDIX B

DISTRICT OF COLUMBIA) ss.:

AFFIDAVIT OF WILLIAM L. GRAY

William L. Gray, being first duly sworn, declares and says as follows:

1. I am a professional translator competent in the French and English languages and licensed to do business in the District of Columbia.

2. For the French text that follows (from page 11 of the decision of the Swiss Federal Tribunal in *Van Cauwenberghe*, No. A 214/85, Sept. 25, 1985):

> a) Selon la demande, le recourant est accusé d'avoir, avec la complicité d'au moins deux individus de nationalité américaine, obtenu une somme totale de 3,6 millions de dollars de financiers belges, devant lesquels il aurait fait miroiter la réalisation d'une affaire immobilière qu'il n'était manifestement pas en mesure de conclure. De tels faits constituent une escroquerie d'argent ou d'autres biens au moyen de fausses allégations, délit mentionné sous ch.6 de l'art. II du Traité.

the following is the correct English translation:

> a) According to the request, the petitioner is accused of having, with the complicity of at least two individuals of American nationality, obtained a total sum of 3.6 million dollars from Belgian financiers, to whom he allegedly touted the realization of a real estate transaction which he was obviously not in a position to complete. Such facts constitute a defrauding of money or other goods by means of false pretenses, a crime mentioned under section 6 of article II of the Treaty.

3. The word "scheme" or its equivalent nowhere appears in the second sentence of French text quoted above.

/s/ William L. Gray
WILLIAM L. GRAY

Subscribed and sworn to
before me this 6th day of
January, 1988:

/s/ Moira E. Ricketts
Notary Public [SEAL]

My Commission Expires February 14, 1988

APPENDIX C

TRANSCRIPT OF PROCEEDINGS

United States v. *Wilfried Van Cauwenberghe*
No. CR 84-963-AAH (U.S.D.C., C.D. Cal.)
October 5, 1987

THE CLERK: Case Number CR-84-963, USA v. Wilfred Van Cauwenberghe. Counsel, your appearances, please?

MR. ARTERBERRY: Good afternoon, John Arterberry for the United States.

MR. KESTER: Good afternoon, Your Honor. John Kester for the defendant.

THE COURT: All right. The only question before the Court is: will I modify the conditions of probation? And if Van Cauwenberghe doesn't want what the Govment wants, I don't see why I should modify it; but I'll hear from counsel.

MR. KESTER: Your Honor, we are before the Court based on findings made by the Court previously and approved by the Court of Appeals. It is our contention that the condition is an illegal condition. We believe that on strictly the basis of humanity, that this man who has been away from his family for three years ought to be able to go home.

THE COURT: I made that order on condition that he guarantee the payment of his fine and restitution, and now he won't do it.

MR. KESTER: And he has done it, Your Honor.

THE COURT: He hasn't done it.

MR. KESTER: He has transferred title to me and to the prosecutor—to the attorney for the United States. He cannot dispose of those assets at all.

THE COURT: He wants you to transfer yours to the Clerk. That's what's happened.

MR. KESTER: That's what the Government wants.

THE COURT: You don't want to give it up. You have some money involved or something.

MR. KESTER: I have no authority to give away a million dollars of my client's money like that.

THE COURT: Then you don't get it. Motion denied. Simple as that. Take it up on appeal if you want to, and stop bothering us with these motions, because you won't do what's required; namely, guarantee the payment of the fine and the restitution, which consists of one million dollars. If you don't want to give it up, too bad. You don't get any reduction or change in the conditions of probation.

MR. KESTER: Your Honor, I believe we have done everything that is legally—

THE COURT: I believe you haven't. You've had a chance to turn that money over, and you don't do it.

MR. KESTER: We have done what we can. We can do no more. This is an illegal sentence. This is a harsh sentence.

THE COURT: No, it is not.

MR. KESTER: This is a disgraceful sentence.

THE COURT: It is not. I think you're disgraceful for saying that. You're disgusting. If you keep it up, I may levy sanctions on you, sir. All right. That's enough. Where are you from? Philadelphia? Philadelphia lawyer? I'm sick of it. All right. Motion denied. Counsel for the Government, prepare the "Order" according to Local Rule 14.

MR. ARTERBERRY: All right, Your Honor.